No. 80-1110

# In the Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH SAND, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**QUESTION PRESENTED**

Whether requiring petitioner to read aloud from a transcript in the presence of the jury violated his constitutional rights.

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 11-12) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on November 3, 1980. The petition for a writ of certiorari was filed on December 30, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a second jury trial in the United States District Court for the Eastern District of Michigan,[1] petitioner was convicted on two counts of making false declarations before a grand jury, in violation of 18 U.S.C. 1623. He was sentenced to concurrent terms of three years' imprisonment (Pet. App. 13-14). The court of appeals affirmed (Pet. App. 11-12).

On January 5, 1978, petitioner appeared before a federal grand jury investigating a scheme to sell automobile parts stolen from a General Motors plant. The mastermind of this scheme was Charles Crosno. During the grand jury proceeding, petitioner testified that he had never discussed the theft or sale of the stolen parts with Crosno (Tr. 17).

At trial, the government played a tape recording, intercepted as the result of a court-authorized electronic surveillance of Crosno's telephone, of a conversation between Crosno and a person named Joe. In the course of the conversation, Crosno and Joe discussed the description, value, and sale of stolen automobile parts (Tr. 102, 131-139; Gov't Exhs. 6, 8). Police investigators and a co-worker testified that they recognized the voice of Joe as that of petitioner (Tr. 148, 187, 255, 274).

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[1] Petitioner's first trial resulted in a mistrial when the jury was unable to reach a verdict (Pet. 3).

Prior to trial and pursuant to a court order, petitioner furnished the government with a voice exemplar in which he repeated the statements made by Joe during the intercepted conversation (Gov't Exh. 21). At trial, several defense witnesses acquainted with petitioner's voice testified that although they recognized his voice in the exemplar, they did not recognize his voice in the intercepted conversation (Tr. 424, 439, 448, 472). A Michigan state police officer trained as an audiologist also testified that although the voice in the exemplar and the voice in the intercepted conversation exhibited similarities, he could not state with certainty that they were identical because the voice in the exemplar exhibited an apparent speech impediment (Tr. 517, 521).

In presenting its rebuttal, the government played a tape recording of petitioner's statements during his arraignment to assist the jury in comparing that voice with the voice in the Crosno conversation (Tr. 554, 588). The trial judge also permitted the government to present an in-court exemplar of petitioner's voice by requiring him to read a portion of the transcript of the intercepted conversation. The judge instructed the jury that this reading was not testimony, and that "[w]hat [petitioner] is saying is to be used by you only to assist you in comparing the voice of [petitioner] with that of the voice identified as Joe" in the intercepted conversation (Tr. 598). After hearing petitioner read, the audiologist testified that there were no obvious differences between petitioner's voice and the voice in the intercepted conversation (Tr. 602).

## ARGUMENT

1. Without citing any authority, petitioner contends (Pet. 5-7) that requiring him to read to the jury portions of a transcript of a tape-recorded conversation constituted compelled testimony, in violation of the Fifth Amendment. But this Court concluded more than 70 years ago that the privilege against compulsory self-incrimination does not

entitle a defendant to "exclu[de] * * *his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof." *Holt* v. *United States*, 218 U.S. 245, 253 (1910). See, *e.g.*, *United States* v. *Euge*, 444 U.S. 707, 718 (1980). Hence, as petitioner expressly concedes (Pet. 6), it is well settled that a defendant may constitutionally be compelled to give a voice exemplar. See, *e.g.*, *United States* v. *Dionisio*, 410 U.S. 1, 5-7 (1973); *United States* v. *Wade*, 388 U.S. 218, 222-223 (1967); *Schmerber* v. *California*, 384 U.S. 757, 764 (1966); *United States* v. *Franks*, 511 F. 2d 25, 32 (6th Cir.), cert. denied, 422 U.S. 1042 (1975).

Petitioner nonetheless suggests that the government's "unfettered" use of voice exemplars somehow trenched upon his right to remain silent. The trial judge carefully explained, however, that petitioner's spoken words were not presented for their testimonial value, but as an identifying physical characteristic to provide both the jury and the expert witness a basis for comparing petitioner's voice with that of "Joe's" in the intercepted conversation. The courts of appeals have repeatedly held that such physical demonstrations involving the defendant and accompanied by proper limiting instructions are permissible. See, *e.g.*, *United States* v. *Murray*, 523 F. 2d 489, 492 (8th Cir. 1975); *United States* v. *Turner*, 472 F. 2d 958, 960 (4th Cir. 1973); *United States* v. *Doremus*, 414 F. 2d 252, 254 (6th Cir. 1969); *United States ex rel. O'Halloran* v. *Rundle*, 384 F. 2d 997 (3d Cir. 1967).

2. For similar reasons, there is no merit to petitioner's contention that the compelled recitation deprived him of due process and a fair trial. The record shows that this recitation was not conducted in a humiliating, demeaning, or misleading fashion (Pet. App. 12), and the trial court's instructions ensured that the jury did not draw any

improper inferences from this demonstration. Moreover, since petitioner does not claim that his recitation was in any way unrepresentative of his normal speaking voice, the jury's ability to hear petitioner speak and to consider another voice exemplar undoubtedly aided rather than impeded the truth-finding process. Accordingly, the court of appeals correctly concluded that petitioner was not denied a fair trial or due process of law. See, *e.g.*, *United States* v. *Giese*, 597 F. 2d 1170, 1193 (9th Cir.), cert. denied, 444 U.S. 979 (1979); *United States* v. *Doremus*, *supra*, 414 F. 2d at 254.[2]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2]Petitioner erroneously suggests (Pet. 8) that the in-court voice exemplar improperly injected his demeanor into the proceedings. Petitioner did not request a limiting instruction on this ground, however (Tr. 597). In any event, if petitioner had refused to comply with the court's order or had attempted to disguise his voice, the jurors would have been entitled to consider his behavior as evidence of consciousness of guilt. See, *e.g.*, *United States* v. *Mitchell*, 556 F. 2d 371, 382 n.7 (6th Cir.), cert. denied, 434 U.S. 925 (1977); *United States* v. *Franks*, *supra*, 511 F. 2d at 35-36; *United States* v. *Nix*, 465 F. 2d 90, 93 (5th Cir.), cert. denied, 409 U.S. 1013 (1972); 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 15.15, at 471 (3d ed. 1977). And, given the trial court's limiting instruction, the jurors' opportunity to observe petitioner while he read from the transcript did not differ significantly from their opportunity to observe petitioner's general demeanor throughout the trial.